No. 94-1342

Supreme Court, U.S.
FILED
APR 5 = 1995

In the Supreme Court of the United States

OCTOBER TERM, 1994

GUILIO J. CONTI AND EDITH CONTI, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

KENNETH L. GREENE
DAVID A. SHUSTER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Commissioner established petitioners' opening cash balance with reasonable certainty.

2. Whether it was an abuse of discretion for the Tax Court to refuse to admit into evidence the results of polygraph tests that petitioners took unilaterally.

Opini
Juris
State
Argu
Conc

Cases

Ba
Da
1
Dou
Est
(3
Fry
Hol
Tiff
(1
Uni
Uni
Uni
88
72
(
Unit
cer
Wolf
cer

Rules:

Fed.
R
R
R

TABLE OF CONTENTS

	Page
›inions below	1
risdiction	1
atement	2
rgument	6
›nclusion	10

TABLE OF AUTHORITIES

ıses:

Barnier v. *Szentmiklosi*, 810 F.2d 594 (6th Cir. 1987)	8
Daubert v. *Merrill Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993)	5, 7, 8
Dowd v. *Calabrese*, 585 F. Supp. 430 (D.D.C. 1984)	4
Estate of Mazzoni v. *Commissioner*, 451 F.2d 197 (3d Cir. 1971)	3
Frye v. *United States*, 293 F. 1013 (D.C. Cir. 1923)	3
Holland v. *United States*, 348 U.S. 121 (1954)	3
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985)	7
United States v. *Abel*, 469 U.S. 45 (1984)	8
United States v. *Harris*, 9 F.3d 493 (6th Cir. 1993)	8
United States v. *Piccinonna*:	
885 F.2d 1529 (11th Cir. 1989)	6, 9
729 F. Supp. 1336 (S.D. Fla. 1990), aff'd, 925 F.2d 1474 (11th Cir. 1991)	9
United States v. *Tucker*, 773 F.2d 136 (7th Cir. 1985), cert. denied, 478 U.S. 1021, 1022 (1986)	8
Wolfel v. *Holbrook*, 823 F.2d 970 (6th Cir. 1987), cert. denied, 484 U.S. 1069 (1988)	8

ules:

Fed. R. Evid.:	
Rule 403	5, 6, 7, 8, 9
Rule 608(b)	9
Rule 702	7

Miscellaneous: Page

H. Balter, *Tax Fraud and Evasion* (5th ed. 1983) 3
J. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should not be Amended*, 138 F.R.D. 631 (1991) 8

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1342

GUILIO J. CONTI AND EDITH CONTI, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 61-74) is reported at 39 F.3d 658. The opinions of the Tax Court (Pet. App. 3-43, 44-57) are reported at 64 T.C.M. (CCH) 1093 and 99 T.C. 370.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1) was entered on November 9, 1994. The petition for a writ of certiorari was filed on February 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Guilio and Edith Conti are married and in their seventies. Mr. Conti, who has a fifth grade education, worked at the Ford Motor Company until 1985, when he retired. During the last 15 years of his employment with Ford, his wages averaged approximately $45,000 per year. Pet. App. 62. Mrs. Conti handled the family's finances. In 1986 and 1987, she made more than 300 bank deposits that exceeded $950,000 in total. Of these deposits, more than $375,000 were in cash. In addition, petitioners maintained several brokerage accounts with sizeable balances. *Id.* at 10-11, 62-63.

The Internal Revenue Service conducted an audit of petitioners' 1986 and 1987 federal income tax returns. On April 18, 1988, an IRS Agent met with Mrs. Conti, her accountant and her son. Mrs. Conti told the IRS Agent that, at the end of 1985, petitioners had approximately $100,000 in cash at their residence and also had more than $20,000 in cash in a safe deposit box. The Agent's notes from the meeting state that "taxpayer keeps large sum of cash on hand, ($150,000)." Pet. App. 63-64.

A short time later, petitioners' accountant met with her son and informed him of the amount of the "cash hoard" that would be required to account for the unexplained increase in petitioners' net worth during 1986. After that meeting, the accountant sent a letter to the IRS stating that petitioners had $450,000 cash on hand at the beginning of 1986. Pet. App. 64.

The Commissioner thereafter issued a notice of deficiency to petitioners for their 1986 and 1987 tax years. Applying the "net worth method," the Com-

missioner determined that petitioners failed to report more than $1,300,000 in taxable income during these two years.[1] That determination was based on the notes from the audit interview with Mrs. Conti, which reflected a beginning cash balance of $150,000 as of January 1, 1986. Pet. App. 63-65.

2. a. Petitioners filed a petition for redetermination of the deficiency in the Tax Court. In doing so, petitioners abandoned their earlier representations concerning the amount of their alleged cash hoard—they asserted that their cash hoard at the beginning of 1986 was not $450,000 but was $800,000 instead. Pet. App. 65. Petitioners unilaterally took polygraph examinations in an effort to bolster their claim. *Id.* at 48. The person who administered the examinations expressed the opinion that petitioners' claim of a cash hoard of $800,000 was truthful, and petitioners offered the results of the polygraph tests into evidence. *Ibid.*

The Tax Court ruled that petitioners' polygraph tests were not admissible. Applying the standard articulated in *Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923), the court concluded that polygraph tests are not admissible because they lack general acceptance as scientific evidence. Pet. App. 44-55, 57. The court further held that the polygraph tests involved in this case were inadmissible for the additional

---

[1] Under the "net worth method," to the extent that an increase in a taxpayer's net worth in each relevant year cannot be explained by reported income or nontaxable sources (such as a "cash hoard"), the increase is deemed to represent unreported income of the taxpayer. See *Estate of Mazzoni* v. *Commissioner*, 451 F.2d 197, 199-201 (3d Cir. 1971). See also *Holland* v. *United States*, 348 U.S. 121, 125-127 (1954); H. Balter, *Tax Fraud and Evasion* ¶ 10.04[10][b] (5th ed. 1983).

reason that they had been arranged and conducted unilaterally by petitioners. The court noted "that the individual taking [the polygraph test] should know that something real is at stake. Absent such conditions no results of significance can be expected." *Id.* at 56, quoting *Dowd* v. *Calabrese*, 585 F. Supp. 430, 433 (D.D.C. 1984).

b. On the merits, petitioners contended that the $1,300,000 increase in their net worth during 1986 and 1987 was accounted for by their asserted $800,000 cash hoard and by undocumented loans in excess of $580,000 allegedly made to them by their son. Their son testified that, although he earned less than $40,000 per year, he had obtained the amounts he allegedly lent to petitioners from personal savings ($75,000), from a divorce settlement ($170,000) and from undocumented, unsecured loans allegedly made to him by various tennis clubs, individuals and banks ($700,000). Pet. App. 25-26, 65-66.

The Tax Court rejected this testimony. The court concluded that petitioners had failed to establish that they had a cash hoard in excess of $150,000 or that they had received loans from their son. Pet. App. 14-16, 29. The court noted that petitioners offered no documentary evidence to support their claims and that the objective evidence—such as petitioners' extensive investment and bank-deposit activity—was inconsistent with their contentions. *Id.* at 22-24. The court noted that petitioners had twice altered the claimed amount of their alleged cash hoard during the course of the case. *Id.* at 23. The court found the testimony concerning both the asserted cash hoard and the claimed loans from petitioners' son to be completely lacking in credibility. *Id.* at 24-29. The court concluded, by contrast, that the Commission-

er's determination concerning petitioners' opening cash balance had a reasonable basis because it was based on information obtained by the IRS Agent from petitioners during the audit. *Id.* at 20-21. The court upheld the determination of deficiency (*id.* at 58) and also found petitioners liable for additions to tax for fraud and for substantial understatements of income (*id.* at 31-37).

3. a. The court of appeals affirmed.[2] Pet. App. 61-74. The court noted that, in *Daubert* v. *Merrill Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), this Court recently rejected the *Frye* test as the sole test for the admissibility of scientific evidence.[3] Because the Tax Court excluded the polygraph evidence in this case on the additional, independent basis that it had been taken unilaterally, the court of appeals concluded that it need not decide whether the Tax Court's reliance on *Frye* was in error. Instead, the court concluded that the Tax Court had not abused its discretion by refusing to admit unilaterally obtained polygraph evidence.

The court explained that the prejudicial effect of unilateral polygraph tests outweighs their probative value and that such tests are therefore properly excluded under Rule 403 of the Federal Rules of Evidence. The court emphasized that a party unilaterally taking a polygraph test has no adverse interest at stake because, if he fails, the results

---

[2] At the suggestion of the parties, the court of appeals remanded the case for the limited purpose of correcting a mathematical error in the determination of the deficiency. Pet. App. 74.

[3] The decision in *Daubert* was entered on June 28, 1993, which was after the Tax Court's decision.

presumably would not be disclosed. The court noted that its decision was not contrary to *United States* v. *Piccinonna*, 885 F.2d 1529 (11th Cir. 1989) (en banc), because in that case the Eleventh Circuit recognized that a court had discretion to exclude confusing and prejudicial polygraph evidence under Rule 403. Pet. App. 68-71.

b. The court of appeals determined that the record supports the Tax Court's findings that petitioners' cash hoard did not exceed $150,000 and that they had not received loans from their son. The court of appeals also concluded that the evidence supported the Tax Court's further finding that the Commissioner had established petitioners' opening cash balance with reasonable certainty from the information obtained during the audit. Pet. App. 71-73.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioners contend (Pet. 9-10) that the courts below clearly erred in finding that petitioners had an unexplained increase in net worth of $1,300,000 in 1986 and 1987. But petitioners' explanation—that they maintained a cash hoard of $800,000 and received more than $580,000 in unsecured loans from their son—was unsupported by any documentation. As the Tax Court and the court of appeals found (Pet. App. 24-29, 71-73), petitioners' testimony was improbable, unreasonable, and unbelievable. By contrast, as the courts below noted (*id.* at 20-21, 71-73), the Commissioner's determination concerning petitioners' opening cash balance was reasonably based upon

information derived by the IRS Agent from petitioners during the audit. Further review of these factual determinations of the courts below is not warranted. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

2. The court of appeals correctly held that the Tax Court did not abuse its discretion in refusing to admit the unilaterally taken polygraph exams. Rule 702 of the Federal Rules of Evidence provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In *Daubert* v. *Merrill Dow Pharmaceuticals, Inc.*, the Court emphasized that a number of factors may bear on the inquiry whether proffered evidence is admissible under Rule 702: (i) whether the scientific theory has been tested, (ii) whether the theory has been subjected to peer review, (iii) what the rate of error of a particular technique is and (iv) whether the theory is generally accepted in the scientific community. 113 S. Ct. at 2796-2797.

But, as the Court recognized in *Daubert*, even if scientific evidence might otherwise be admissible under Rule 702, it is still subject to exclusion under other provisions of the Federal Rules of Evidence. The Court expressly noted that confusing and prejudicial evidence remains excludible under Rule 403:

> Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially

> outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Judge Weinstein has explained: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses."

113 S. Ct. at 2798, quoting Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should not be Amended*, 138 F.R.D. 631, 632 (1991). In determining whether such evidence was properly excluded under Rule 403, it is well settled that trial courts are to be "accorded a wide discretion." *United States* v. *Abel*, 469 U.S. 45, 54 (1984).

The court of appeals properly concluded that the results of the polygraph test taken by petitioners were properly excluded under Rule 403 in the present case. Petitioners had no adverse interest at stake in taking the tests. Neither the government nor the court had any input with respect to the designation of the examiner, the phrasing of the questions or the conditions under which the examinations were taken. In these circumstances, the Tax Court did not abuse its broad discretion in determining that the danger of unfair prejudice and confusion from the unilaterally taken polygraph tests outweighed any probative value of those tests. See *United States* v. *Harris*, 9 F.3d 493, 502 (6th Cir. 1993); *Wolfel* v. *Holbrook*, 823 F.2d 970, 974 (6th Cir. 1987), cert. denied, 484 U.S. 1069 (1988); *Barnier* v. *Szentmiklosi*, 810 F.2d 594, 597 (6th Cir. 1987); *United States* v. *Tucker*, 773 F.2d 136, 141 (7th Cir. 1985), cert. denied, 478 U.S. 1021, 1022 (1986).

Contrary to petitioners' assertion (Pet. 5-9), the decision in this case does not conflict with *United States* v. *Piccinonna*, 885 F.2d 1529 (11th Cir. 1989) (en banc). As the court of appeals stated (Pet. App. 70), to the extent it is relevant here, the *Piccinonna* decision reflects only that, in the absence of a stipulation by the parties permitting the admission of polygraph evidence, the trial court has wide discretion under Rule 403 to exclude such evidence. See 885 F.2d at 1536-1537. The decision in *Piccinonna* does not support the suggestion that confusing and prejudicial polygraph evidence must be admitted at trial.[4]

---

[4] Moreover, the district court on remand in *Piccinonna* held that the results of a single polygraph test were inadmissible under Rule 608(b) of the Federal Rules of Evidence. That Rule provides that specific instances of the conduct of a witness for the purposes of supporting his credibility may not be proved by extrinsic evidence. See *United States* v. *Piccinonna*, 729 F. Supp. 1336 (S.D. Fla. 1990). The order of the district court was affirmed on appeal. 925 F.2d 1474 (11th Cir. 1991) (Table).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

KENNETH L. GREENE
DAVID A. SHUSTER
Attorneys

APRIL 1995